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No. 89-1861

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

MIC MAC NATION,

Petitioner,

v.

DONALD JAMES GIESLER, et al.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI (From the Court of Appeal of The State of California)

RANDALL B. HICKS
1940 W. Orangewood Ave., Suite 203
Orange, California 92668
(714) 978-2588
Attorney for Respondents
Donald James Giesler and
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STATEMENT OF THE CASE

The Statement of the Case as provided by Petitioner in its Petition for Writ of Certiorari is essentially accurate, although some omissions of certain facts result in a Statement of the Case less that fully informative. In the interests of judicial economy, Respondent hereby incorporates by reference the Opinion of the court of appeal of the State of California, specifically the section entititled "FACTS," and contained in the Petition for Writ of Certiorari, p. 2a, 3a-I7a.

ARGUMENT

I

CONSIDERATIONS GOVERNING REVIEW ON A WRIT OF CERTIORARI DEMONSTRATE THE APPROPRIATENESS OF DENYING THE PETITION FOR WRIT OF CERTIORARI

The court decision from which the Writ is sought is not in conflict with

any decision of this Court, any United States court of appeal, or state court of last resort. Neither does the decision conflict in any way with the clear language of the Indian Child Welfare Act, 25 U.S.C. 1901 et. seq. (hereinafter "the Act").

The Petitioner, Mic Mac Nation of Nova Scotia, Canada, has phrased the issues in their "Questions Presented" in a manner Respondents respectfully submit virtually ignores by ommision the primary and dispositive issue in the case, which is whether or not an Indian tribe not located in the United States and not recognized by the Secretary of the Interior is eligible for the benefits of the Act. Instead, the Petitioner implies conflict with this Court's recent ruling in Mississippi Band of Choctaw Indians v.

Holyfield 490 U.S. ____, 109 S.Ct. 1597, 104 L.Ed. 2d 29, (1989) regarding domicile of the Indian parent. This issue is not even reached in the present case until the threshold issue of the Mic Mac tribe's eligibility of the Act is met. Most importantly, a review of the California court of appeal's decision (contained it the Petition for Writ of Certiorari at page 2a) demonstrates the court's respectful and repeated citing of Holyfield, supra, and its unequivocal following of that decision.

The Petitioner also misstates the law in effect by omitting any reference to the sections of the Act and Code of Federal Regulations dealing with tribal eligibility for the Act. This is most simply seen by a review of Petitioner's Table of Authorities, where the only

citation to the Act is one section regarding domicile. Respondents shall briefly present those sections of the Act and interpreting federal codes addressing this issue.

Respondent noted noncompliance with the Court Rules in the Petition for Writ of Certiorari in that:

(1) Statutes were not provided i full and two of three cited treaties were not provided. Rule 14,1(f);

(2) Only one copy of the Petition was served on Respondent, not three. Rule 29.3;

(3) No notice was ever received by Respondent regarding the date of filing and docket number. Rule 12.1.

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II

THE DISPOSITIVE THRESHOLD ISSUE BEFORE THE LOWER COURT WAS WHETHER AN INDIAN TRIBE, LOCATED IN NOVA SCOTIA, CANADA, AND UNRECOGNIZED BY THE SECRETARY OF THE INTERIOR, IS ELIGIBLE TO RECEIVE BENEFITS OF THE INDIAN CHILD WELFARE ACT

The Mic Mac Tribe intervening in this action, of which the minor's mother is eligible for membership, is located in Nova Scotia, Canada. There is no ambiguity regarding the fact that only American Indian tribes are entitled to the benefits of the Act and the exclusive jurisdiction over children which may flow therefrom when reservation domicile is established. Just as surely, however, as Congress lacks plenary power to legislate over Canadian Indian tribes, is the Canadian Indian tribe's lack of right to benefit from American Indian programs.

The Act, in defining its own terms

and scope, limits its applicability to "Indian tribes." 25 U.S.C. section 1903(8) defines "Indian tribe" to mean "any Indian tribe, band, nation or other organized group or community of Indians recognized as eligible for the services provided to Indians because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43." (Emphasis added.) "Secretary" is defined as the Secretary of the Interior. 25 U.S.C. section 1903(1).

Federal regulations interpreting the Act leave no room for doubt that only "recognized" American tribes are covered by the Act. 25 C.F.R. 83.2 provides that "the purpose of this part is to establish a departmental policy and procedure for acknowledging that certain American

tribes exist. Such acknowledgment of tribal existence by the department is a prerequisite to the protection, services and benefits from the federal government available to Indian tribes. (Emphasis added). 25 C.F.R. 83 sets forth "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe." Section 83.1(f) states that "Indian tribe" means "any Indian group within the continental Unites States that the Secretary of Interior acknowledges to be an Indian tribe." Section 83.4, entitled "Who May File," states that "any Indian group in the continental United States believing it should be acknowledged as a tribe and satisfying statutory criteria can petition the Secretary. The Secretary of the Interior is entitled to make reasonable

classifications and set eligibility requirements. Morton v. Ruiz 415 U.S. 199, 230-236, 94 S.Ct. 1055, 39 L.Ed. 2d 270(1974).

25 C.F.R. 83.6(b) requires the Secretary to publish in the Federal Register all Indian tribes recognized and eligible to receive services from the Bureau of Indian Affairs. Accordingly, 51 Fed. Reg. No. 132, Thursday, July 10, 1986, lists "Indian Tribal Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs." This was the most current Federal Register listing at the time of trial. Neither Mic Mac tribe appears on that listing. Neither does either tribe appear on any subsequent Federal Register listing.

The Petitioner makes much about the

fact that there is a Mic Mac Indian tribe located in Maine, thus within the United States. This tribe is also not recognized, however. Even if it were recognized, there was no evidence presented at trial, or in any subsequent proceeding, that the two tribes were affiliated or that the minor's mother's membership in the Nova Scotia Mic Mac tribe made her or the child eligible for the Maine Mic Mac tribe. No appearance, or contact of any type, was made during any of the proceedings below by a representative of the Maine Mic Mac tribe. Petitioner sought, and received, an order from the trial court sending the child to the Mic Mac tribe in Canada, not Maine.

Petitioner states that it is unjust to deny the Act's privileges to the Mic

Mac tribe simply because they are unwilling "to go through the lengthy and arduous procedure, in order to be placed on the (Secretary of the Interior's) listing." Such is hardly a noble argument, in effect stating: "petitioning for recognition is too much trouble but award us the Act's privileges anyway." In examining the guidelines contained within the Code of Federal Regulations governing recognition and eligibility for the Act, it is clear that many critical factors are examined beyond a group's Indian ancestry. 25 C.F.R. 83.7 provides these guidelines for the Secretary of the Interior: Tribal means of identifying those eligible for membership, existence of a tribal court and its guidelines, conformity with the Indian Civil Rights Act, past tribal

recognition by the government, form of tribal government, existence of a tribal constitution and bylaws, existence and size of the tribal reservation, but to list but a few.

The critical necessity to awarding only those tribes worthy of the Indian Child Welfare Act's privileges the necessary recognition is the tremendous power that exclusive jurisdiction governing children can wield. Such power, superceding state child welfare laws in many instances, could destroy the lives of Indian children and parents if determined the tribal government is not prepared for such responsibility.

Petitioner's last answer to its lack of recognition is the existence of three treaties, the Treaty of Amity from 1794, the Treaty of Ghent from 1814 and the

Treaty of Watertown from 1776. The first two do not even deserve extensive comment. The Mic Mac tribe was not a party to the treaties, nor were they even mentioned in any way. The treaties were between the United States and Great Britain, not any tribe. Most importantly, the treaties had nothing to do with child welfare, rather dealt with navigational rights in the Mississippi river and a cessation of hostilities between the United States and tribes with whom it was at war, respectively. If the Mic Mac tribe deserves recognition and the Act's privileges based upon that "relationship," or lack thereof, with the United States government, then every other tribe located in Canada could make the same argument. Notably, Petitioner did not provide a copy of the treaties in

the Petition for Writ of Certiorari's appendix, defeating easy review.

The only treaty to which the Mic Mac tribe was apparently a party is the Watertown treaty (the treaty refers to "Mickmac" Indians, rather than Mic Mac Indians). In the trial court Petitioner provided this was an "unpublished" treaty and was unable to provide to the court its terms (Petition for Writ of Certiorari, "Statement of Decision and Judgment of Trial Court," page 42a, 48a), seemingly waiving the opportunity to produce a copy subsequent to the trial court's ruling. Regardless, the treaty was entered into by the Governors of Massachusetts Bay, not the United States government. It cannot be disputed that states do not have the authority to enter into treaties on behalf of the federal

government. Of greatest importance is the fact the terms of the treaty dealt with the use of troops during the war existing at that time, not child welfare.

It could be that the treaty has some validity regarding the scope of the treaty, but it is preposterous to allege that the modern, specific and self-limiting scope of the Indian Child Welfare Act is circumvented by such treaties with absolutely no nexus to the issues governed by the Act. Indeed, Petitioner's contention that the mere existence of such "recognition" by the United States government (actually the Commonwealth of Massachusetts) in the existence of the Watertown Treaty accords the privileges of the Act in and of itself is completely illogical. 25 C.F.R. 83.7 lists "past tribal

recognition by the government" as only one consideration among many in making a determination regarding eligibility.

Clearly, mere recognition in some general sense is not intended to circumvent the critical eligibility analysis. If such were the case the federal government could not deal in any formal way regarding any issue with any Indian tribe or foreign Indian entity without defeating the clear intentions of the Act regarding eligibility for very special and specific privileges, and nothing is more important than those controlling the lives of children.

III

THE MINOR WAS NOT RESIDING OR DOMICILED ON THE RESERVATION

Even if the Mic Mac tribe were found to be eligible for the privileges of the Act, exclusive jurisdiction would not

result unless the minor resided or was domiciled on the reservation. 25 U.S.C. 1911(a). A bona-fide "Indian child" covered by the Act but not domiciled or residing on the reservation may stay in the state court system if desired by the Indian parent (who here opposes tribal jurisdiction and desires the child to be adopted by the parents she selected and with whom he has been living his entire life). 25 U.S.C. 1911(b). Additionally, 25 U.S.C. 1912(e) and (f) provide special considerations for a child who would suffer serious emotional or physical injury if sent to the tribe. Here, where the child has lived with the adoptive parents since birth and required extra-ordinary parenting due to the need for many past and future surgeries resulting from problems at birth, there is no

question as to the serious detriment in uprooting him and sending him 3,500 miles away to another country and an alien environment.

Petitioner's Petition, in its "Questions Presented" asks whether "domicile" "requires that a Mic Mac mother reside continuously, prior to and subsequent to the birth of the Indian child." This implies the California court of appeal ruled that all three conditions were required for domicile to be found. To the contrary, the court reiterated this Court's decision in Mississippi Band of Choctow Indians v. Holyfield 490 U.S. ____, 109 S.Ct. 1597, 104 L.Ed. 2d 29 (1989).

The facts of the instant case bear little resemblence to those in Holyfield, supra. In Holyfield, both Indian parents

resided and were domiciled on a reservation but travelled 200 miles away from the reservation to give birth with the express intent to place the child for adoption and defeat the exclusive jurisdiction of the Act based upon domicile. Mississippi Band of Choctow Indians v. Holyfield 490 U.S. ____, 109 S.Ct. 1597, 1610, 104 L.Ed. 2d 29 (1989).

In the present case, the minor's mother did not drive 200 miles away to simply to give birth: She relocated 3,500 miles away in another country. She lived in Los Angeles, California, approximately one year before conception, conceived the child in Los Angeles, gave birth in Los Angeles, and continued to reside in Los Angeles for at least ten months after the birth. See Petition for

Writ of Certiorari, "Opinion of California Court of Appeal," page 30a. Furthermore, prior to living in Los Angeles, it appears that she lived in Boston for several years as she received her G.E.D. high school equivalent degree there, as well as married and divorced (five years after the marriage) there. See Petition for Writ of Certiorari, "Opinion of California court of appeal," page 6a. It appears that the minor's mother has continued to live away from the Mic Mac tribe as Petitioner's Petition is silent regarding her present residence. Respondents are informed and believe she is, and for more than one year has been, living somewhere in Canada, away from the reservation.

It is not disputed that unborn children conceived outside of marriage

generally assume the domicile of the mother. Here, the mother's residence was without doubt Los Angeles. Although residence does not always indicate domicile, it is a primary consideration. Following this Court's guidelines as set forth in Mississippi Band of Choctaw Indian Band v. Holyfield 490 U.S. ____ 109 S.Ct. 1597, 1608, 104 L.Ed. 2d 29 (1989) that "physical presence in a place in connection with a certain state of mind concerning one's intention to remain there" indicates domicile, there is no room for doubt that Los Angeles, not the reservation in Nova Scotia, Canada, was her residence and domicile at birth, thus that of the child.

California properly has jurisdiction over the Canadian Indian tribe based upon the minor's conception in Los Angeles,

birth in Los Angeles, his American citizenship (and his rights flowing therefrom) resulting from his birth here, and his continued residence in Los Angeles since birth.

IV

CONCLUSION

Before this Court is Petitioner, an Indian tribe not recognized by the Secretary of the Interior and not located in the United States. The tribe claims not only eligibility of the Act, but exclusive jurisdiction over the child based upon his alleged reservation domicile as well. This is despite the uncontested facts that the mother lived in Los Angeles prior to conception of the child, conceived the child in Los Angeles, gave birth in Los Angeles, lived in Los Angeles for at least ten months

after birth, and still does not make the reservation her home. She herself informed the court of appeals her residence and domicile was Los Angeles at birth. Unlike the facts in Holyfield, there was no deception planned, rather a simple change of domicile.

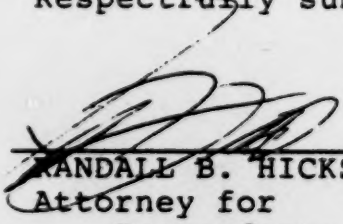
Respondents and hopeful adoptive parent, Donald and Deborah Giesler, met the minor's mother through a licensed California Adoption Agency, Christian and Family Adoption Agency, where she choose them as adoptive parents. Although she vacillated for a short time, she desires that they adopt her child without interferrence from the tribe. The child has bonded to the Gieslers. They have fed, bathed, sheltered him and given him the love a child needs, especially considering his extra-ordinary needs due

to his past serious medical problems and surgeries (colostomy etc.). They have taught him to walk. They have taught him to talk. They are the only parents he has ever known. They are "Mom" and "Dad." To uproot him to a strange environment, 3,500 miles away, in another country and away from the only family he has ever known is beyond any child's worst nightmare.

Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

DATED: July 18, 1990

Respectfully submitted,



RANDALL B. HICKS
Attorney for
Respondents